

## EXECUTIVE OFFICE OF THE MAYOR

NOTICE OF FINAL RULEMAKING

The Mayor of the District of Columbia, pursuant to the authority set forth in the Freedom of Information Act of 1976, effective March 25, 1977 (D.C. Law 1-96, D.C. Official Code §§ 2-531 *et seq.* (2001)), hereby gives notice that final rulemaking action was taken to adopt the following amendments to Chapter 4 of Title 1. The amendments update the existing rules and clarify the appeal process. These rules amend Chapter 4 of the D.C. Freedom of Information Regulations, published at 23 DCR 3744 (1977), amended at 24 DCR 6211 (January 27, 1978), 44 DCR 2316 (April 18, 1997), 44 DCR 2984 (May 16, 1997), and 23 DCR 9668 (June 3, 1977).

No comments have been received under the notice of proposed rulemaking published at 51 DCR 10457a (November 12, 2004). Final rulemaking action was taken on December 13, 2004. These amendments will be effective upon publication of this notice in the *D.C. Register*.

## CHAPTER 4

## FREEDOM OF INFORMATION

Title 1, Chapter 4 is amended to read as follows:

**400 PURPOSE AND APPLICATION**

- 400.1 This chapter contains the rules and procedures to be followed by all agencies, offices, and departments (hereinafter "agency") of the District of Columbia Government which are subject to the administrative control of the Mayor in implementing the Freedom of Information Act, D.C. Law 1-96, 23 DCR 3744 (1977) (hereinafter "the Act") and all persons (hereinafter "requesters") requesting records pursuant to the Act.
- 400.2 For the purpose of this chapter, "agency" includes the Executive Office of the Mayor.
- 400.3 Employees may continue to furnish to the public, informally and without compliance with these procedures, information and records, which they customarily furnish in the regular performance of their duties.
- 400.4 The policy of the District of Columbia Government is one of full and responsible disclosure of its identifiable records consistent with the provisions of D.C. Law 1-96. All records not exempt from disclosure shall be made available. Moreover, records exempt from mandatory disclosure shall be made available as a matter of

discretion when disclosure is not prohibited by law or is not against the public interest.

**401 AGENCY RESPONSIBILITY**

401.1 The ultimate responsibility for responding to requests for records of an agency is vested in the agency head.

401.2 Each agency head shall designate an individual as the Freedom of Information Officer of the agency and may delegate to that individual the authority to grant and deny requests and to respond to appeals pursuant to §§ 412.5 and 412.6 of this chapter.

401.3 Each agency shall post the name, title, address, telephone number, fax number, and e-mail address of its designated Freedom of Information Officer on its web page.

401.4 All Freedom of Information Officers shall attend the meetings and training sessions, as scheduled and conducted by the Freedom of Information Act Committee established by Mayor's Order 2001-30, entitled "Establishment-Freedom of Information Act (FOIA) Committee," dated February 27, 2001.

401.5 All agency employees who maintain records shall assist the designated Freedom of Information Officer, as appropriate, with the identification and search of responsive records.

**402 REQUESTS FOR RECORDS**

402.1 A request for a record of an agency may be made orally or in writing and shall be directed to the particular agency.

402.2 Although oral requests may be honored, a requester may be asked to submit in writing a request for records.

402.3 A written request may be mailed, faxed or e-mailed to the agency Freedom of Information Officer, or agency head in the absence of a designated Freedom of Information Officer. The outside of the envelope or the subject line of the fax or e-mail shall state: "Freedom of Information Act Request" or "FOIA Request". In addition, a request shall include a daytime telephone number, e-mail address or mailing address for the requester.

402.4 A request shall reasonably describe the desired record(s). Where possible, specific information regarding names, places, events, subjects, dates, files, titles, file designation, or other identifying information shall be supplied.

402.5 Where the information supplied by the requester is not sufficient to permit the identification and location of the record by the agency without an unreasonable amount of effort, the requester shall be contacted and asked to supplement the request with the necessary information. Every reasonable effort shall be made by the agency to assist in the identification and location of requested records.

403-404 **RESERVED**

**405 TIME LIMITATIONS**

405.1 Within the time prescribed by applicable law following the receipt of a request, the agency shall determine whether to grant or to deny the request and shall dispatch its determination to the requester, unless an extension is made pursuant to §§ 405.2 and 405.3 of this section.

405.2 In unusual circumstances as specified in § 405.3, the agency may extend the time for initial determination on a request up to the time prescribed by applicable law.

405.3 An extension shall be made by written notice to the requester, which shall set forth the reason or reasons for the extension. As used in this section "unusual circumstances" means, but only to the extent necessary to the proper processing of the request, either of the following:

- (a) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
- (b) The need for consultation with another agency having a substantial interest in the determination of the request or among two (2) or more components of the agency having substantial subject matter interest therein.

405.4 If no determination has been dispatched at the end of the period prescribed by law or the extension thereof, the requester may deem his or her request denied, and exercise a right of appeal in accordance with § 412.

405.5 When no determination can be dispatched within the applicable time limit, the agency shall nevertheless continue to process the request. On expiration of the time limit, the agency shall inform the requester of the following:

- (a) The reason for the delay;
- (b) The date on which a determination may be expected; and
- (c) The right to treat the delay as a denial and of the appeal rights provided by the Act and this chapter.

The agency may ask the requester to forego appeal until a determination is made.

- 405.6 For purposes of this chapter, a request is deemed received when the designated Freedom of Information Officer, or agency head in the absence of a designated Freedom of Information Officer, receives the request submitted in compliance with the Act and this chapter. When the Freedom of Information Officer, pursuant to § 402.5, contacts the requester for additional information, then the request is deemed received when the Freedom of Information Officer receives the additional information.

**406 EXEMPTIONS**

- 406.1 No requested record shall be withheld from inspection or copying unless both of the following criteria apply:

- (a) It comes within one of the classes of records exempted by the D.C. Law 1-96; and
- (b) There is need in the public interest to withhold it.

- 406.2 The classes of records authorized to be exempted from disclosure shall be those records which concern matters that are of the following nature:

- (a) Trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained;
- (b) Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;
- (c) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of those records would do the following:
  - (1) Interfere with enforcement proceedings;
  - (2) Deprive a person of a right to a fair trial or an impartial adjudication;
  - (3) Constitute an unwarranted invasion of personal privacy;
  - (4) Disclose the identity of a confidential source and, in the case of a record compiled by a law enforcement authority in the course of a criminal investigation, or by an agency

conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

- (5) Disclose investigative techniques and procedures not generally known outside the government; or
- (6) Endanger the life or physical safety of law enforcement personnel;
- (d) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (e) Test questions and answers to be used in future license, employment, or academic examinations, but not previously administered examinations or answers to questions thereon;
- (f) Information specifically exempted from disclosure by statute (other than this section), provided that the statute does one of the following:
  - (1) Requires that the matters be withheld from the public in a manner as to leave no discretion on the issue; or
  - (2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (g) Information specifically authorized by Federal law under criteria established by a Presidential Executive Order to be kept secret in the interest of national defense or foreign policy which is in fact properly classified pursuant to that Executive Order;
- (h) Information exempted from disclosure by D.C. Official Code § 28-4505 (2001);
- (i) Information disclosed pursuant to D.C. Official Code § 5-417 (2001);
- (j) Any specific response plan, including any District of Columbia response plan, as that term is defined in D.C. Official Code § 7-2301(1A) (2001), and any specific vulnerability assessment, either of which is intended to prevent or to mitigate an act of terrorism, as that term is defined in D.C. Official Code § 22-3152(1) (2001);
- (k) Information exempt from disclosure by § 47-2851.06 (2001); and

- (l) Any further exemption from disclosure that may be provided by applicable law.

406.3 Any reasonably segregable portion of a record shall be provided to any person requesting the record after deletion of those portions, which are exempt under this section.

#### 407 RESPONSES TO REQUESTS

407.1 When a requested record has been identified and is available, the agency shall notify the requester where and when the record will be made available for inspection or copies will be made available. The notification shall also advise the requester of any applicable fees.

407.2 A response denying a written request for a record shall be in writing and shall include the following information:

- (a) The identity of each person responsible for the denial, if different from that of the person signing the letter of denial;
- (b) A reference to the specific exemption or exemptions authorizing the withholding of the record with a brief explanation how each exemption applies to the record withheld. Where more than one record has been requested and is being withheld, the foregoing information shall be provided for each record or portion of a record withheld; and
- (c) A statement of the appeal rights provided by the Act and this chapter.

407.3 If a requested record cannot be located from the information supplied or is known to have been destroyed or otherwise disposed of, the requester shall be so notified.

#### 408 FEES

408.1 Charges for services rendered in response to information requests shall be as follows (not to exceed a maximum search fee per request as may be imposed by applicable law):

- (a) Searching for records, \$4.00 per quarter hour, after 1st hour, by clerical personnel (DS 1 through 8);
- (a-1) Searching for records, \$7.00 per quarter hour after the 1<sup>st</sup> hour, by professional personnel (DS 9 through 13);
- (b) Searching for records, \$10.00 per quarter hour after the 1<sup>st</sup> hour, by supervisory personnel (DS 14 and above);

- (c) Copies made by photocopy machines....\$ .25 per page;
  - (d) Charges for the initial review of documents, as permitted by applicable law, shall be assessed at the rate provided in subsections (a), (a-1), and (b) above.
- 408.2 When a response to a request requires services or materials for which no fee has been established, the direct cost of the services or materials to the government may be charged, but only if the requester has been notified of the cost before it is incurred.
- 408.3 Where an extensive number of documents is identified and collected in response to a request and the requester has not indicated in advance his or her willingness to pay fees as high as are anticipated for copies of the documents, the agency shall inform the requester that the documents are available for inspection and for subsequent copying at the established rate.
- 408.4 A charge of one dollar (\$ 1) shall be made for each certification of true copies of agency records.
- 408.5 Search costs, not to exceed any dollar limitation prescribed by the Act for each request, may be imposed even if the requested record cannot be located. No fees shall be charged for examination and review by an agency to determine whether a record is subject to disclosure.
- 408.6 To the extent permitted by applicable law, an agency shall require that fees as prescribed by these rules shall be paid in full prior to issuance of requested copies.
- 408.7 Remittances shall be in the form either of a personal check or bank draft on a bank in the United States, or a postal money order. Remittance shall be made payable to the order of the D.C. Treasurer and mailed or otherwise delivered to the Freedom of Information Officer, or the head of the agency in the absence of a designated Freedom of Information Officer.
- 408.8 A receipt for fees paid shall be given only upon request. No refund shall be made for services rendered.
- 408.9 An agency may waive all or part of any fee when it is deemed to be either in the agency's interest or in the interest of the public.
- 408.10 A requester seeking a waiver or reduction of fees shall provide a statement in his or her request letter explaining how the requested records will be used to benefit the general public.

408.11 The price for the publication *Indices: A Statistical Index to the District of Columbia* shall not exceed sixty dollars (\$ 60), to be paid by check made payable to the "D.C. Treasurer."

409-411 **RESERVED**

412 **REVIEW OF DENIALS**

412.1 When a request for records has been denied in whole or in part by an agency, the requester may appeal the denial to the Mayor or may seek immediate judicial review of the denial in the D.C. Superior Court.

412.2 Unless the Mayor otherwise directs, the Secretary shall act on behalf of the Mayor on all appeals under this section, except that in the case of an initial denial by the Secretary, the Mayor or the designee thereof shall act on the appeal. If the Mayor directs that a person other than the Secretary act on the Mayor's behalf on appeals under this section, references in this chapter to the "Secretary" shall be deemed to refer instead to the person designated by the Mayor.

412.3 An appeal to the Mayor shall be in writing. The appeal letter shall include "Freedom of Information Act Appeal" or "FOIA Appeal" in the subject line of the letter as well as marked on the outside of the envelope. The appeal shall be mailed to:

Mayor's Correspondence Unit  
FOIA Appeal  
1350 Pennsylvania Ave, NW  
Suite 221  
Washington, D.C. 20004

The requester shall forward a copy of the appeal to the Freedom of Information Officer, or agency head in the absence of a designated Freedom of Information Officer, of the agency whose denial is the subject of the appeal.

412.4 An appeal to the Mayor shall be in writing and shall include:

- (a) Statement of the circumstances, reasons or arguments advanced in support of disclosure;
- (b) Copy of the original request, if any;
- (c) Copy of any written denial issued under § 407.2; and
- (d) Daytime telephone number, email address or mailing address for the requester.



- 412.5 Within five (5) days (excluding Saturdays, Sundays, or legal public holidays) of receipt of its copy of the FOIA appeal the agency shall file a response with the Secretary. The response shall include the following documents:
- (a) The agency's justification for its decision not to grant review of records as requested, to the extent not provided in the agency's letter of denial to the requester;
  - (b) Any additional documentation as may be necessary and appropriate to justify the agency's decision, such as a *Vaughn* index of documents withheld, an affidavit or declaration of a knowledgeable official or employee testifying to the decision to withhold documents, or such other similar proof as the circumstances may warrant; and
  - (c) A copy of the public record or records in dispute on the appeal; provided, that if the public record or records are voluminous, the agency may provide a representative sample; and provided further, that if the public record contains personal, sensitive, or confidential information, the public body may redact such information from the copy furnished the Secretary in a manner that makes clear that the agency has made redactions.
- 412.6 An agency may request additional time to file documentation required by § 412.5 by filing a written or e-mailed request to the Secretary with a copy to the requester. The request for additional time must be filed within five (5) days (excluding Saturdays, Sundays, and legal public holidays) of receipt of the appeal. The Secretary will respond to the request for additional time with a copy to the requester. An agency that does not file the information required by § 412.5 within the time provided herein or such further time as the Secretary may provide in response to written or e-mail request shall be deemed to have waived its right to respond to the appeal.
- 412.7 A written determination with respect to an appeal shall be made within ten (10) days (excluding Saturdays, Sundays and legal public holidays) of the filing of the appeal.
- 412.8 If the records, or any segregable part thereof, are found to have been improperly withheld, the Secretary shall order the agency to make them available. If the agency continues to withhold the records, the requester may seek enforcement of the order in the Superior Court.
- 412.9 A denial in whole or in part of a request on appeal shall set forth the exemption relied upon, a brief explanation consistent with the purpose of the exemption of how the exemption applies to the records withheld, and the reasons for asserting it. The denial shall also inform the requester of the right of judicial review.

- 412.10 If no determination has been dispatched at the end of the ten-day period, the requester may deem his or her appeal denied, and exercise his or her right to judicial review of the denial.
- 413 **RECORDS MAINTAINED BY AGENCIES**
- 413.1 Each agency shall make and maintain records pertaining to each request for information, including copies of correspondence. The record(s) shall be filed by individual request.
- 413.2 Each agency shall maintain a file, open to the public, which shall contain copies of all letters of denial.
- 413.3 Where the release of the identity of the requester or other identifying details related to the request would constitute a clearly unwarranted invasion of personal privacy, the agency shall delete identifying details from the copies of the documents maintained in the public files.
- 413.4 Each agency shall also maintain records permitting annual reporting of the following information:
- (a) Total number of requests made to the agency;
  - (b) The number of requests granted and denied, in whole or in part;
  - (c) The number of times each exemption was invoked as the basis for non-disclosure;
  - (d) The names and titles or positions of each person responsible for the denial of records and the number of instances each person was involved in a denial; and
  - (e) The amount of fees collected, and the amount of fees for duplication and search waived by the agency.
- 413.5 On or before the 31st day of December of each year, each agency shall compile and submit to the Secretary its report covering the fiscal year concluded the preceding September 30<sup>th</sup> pursuant to the provisions of this section and on other matters relating to agency compliance with the terms of the Act.
- 413.6 With respect to appeals pursuant to § 412, the Secretary shall maintain records reflecting the number of appeals taken, the results of the appeals, and the number of times each exemption was invoked as the basis for non-disclosure.
- 414 **RESERVED**

**415            OVERSIGHT**

415.1            On or before the 1st day of February of each year, the Secretary shall compile and submit to the Council of the District of Columbia, on behalf of the Mayor, a report covering the disclosure activities of each agency and of the Executive as a whole during the preceding fiscal year.

**416-417        RESERVED**